No. 22-174

In the Supreme Court of the United States

GERALD E. GROFF,

Petitioner,

v.

LOUIS DEJOY, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What "undue hardship" standard should replace the *Hardison* standard?

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others.

Becket has litigated numerous cases involving religious exercise by employees in the workplace as both party and amicus counsel, including in this Court. See, *e.g.*, *Rigdon* v. *Perry,* 962 F. Supp. 150 (D.D.C. 1997) (Catholic employee); *Tagore* v. *United States*, 735 F.3d 324 (5th Cir. 2013) (Sikh employee); *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) (Muslim employee); *Abeles* v. *MWAA*, No. 17-138, cert. denied, 138 S. Ct. 252 (2017) (Jewish employee); *Patterson* v. *Walgreen Co.*, 727 Fed. Appx. 581 (2018), cert. denied, 140 S. Ct. 685 (2020) (Seventh-day Adventist employee); *Di Liscia* v. *Austin*, No. 1:21-cv-01047-TJK (complaint filed April 15, 2021) (Jewish and Muslim employees); *Dalberiste* v. *GLE Associates, Inc.*, 814 Fed. Appx. 495 (11th Cir. 2020), cert. denied, 141 S. Ct. 2463 (2021) (Jehovah's Witness employee); *Hedican* v. *Walmart Stores E., L.P.*, 142 S. Ct. 1357 (2022), vacating judgment in *EEOC* v. *Walmart Stores E., L.P.*, 992 F.3d 656 (7th Cir. 2021) (Seventh-day Adventist employee); *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (Christian employee); *Singh* v.

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[1] No counsel for a party authored this brief in whole or in part and no person other than Amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Berger, 56 F.4th 88 (D.C. Cir. 2022) (Sikh prospective employees).

Becket has also frequently argued to this Court that the Establishment Clause analysis set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) has had an unremittingly corrosive impact on the law. See, *e.g.*, *Mitchell* v. *Helms*, 530 U.S. 793 (2000); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1 (2004); *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014); *American Legion* v. *American Humanist Ass'n*, 139 S. Ct. 2067 (2019); *Shurtleff* v. *City of Boston*, 142 S. Ct. 1583 (2022); *Kennedy*, 142 S. Ct. 2407.

Becket offers this brief to help elucidate the proper standard for the reasonable accommodation/undue hardship standard under Title VII, unencumbered by the weight of *Lemon*'s and *Hardison*'s errors.

INTRODUCTION

Hardison took the law of workplace religious accommodation on an almost five-decade detour away from the text and history of Title VII. As scholars have long recognized, that harmful detour in 1977 resulted from the Court's then-current understanding of the Establishment Clause after *Lemon*. But now that this Court has abandoned *Lemon*, it faces the important question of how to interpret Title VII's reasonable accommodation/undue hardship standard properly, without allowing outdated Establishment Clause misunderstandings to weaken federal civil rights granted by Congress.

As Petitioner has explained, *Hardison*'s invented *de minimis* standard is unsupported by the text and history of the 1972 amendments to Title VII and ought have no *stare decisis* effect on the interpretation of

Title VII. This case thus presents the Court with the opportunity to put the law of workplace religious accommodation back on the track Congress had originally designed for it in 1972, before *Hardison* (and *Lemon*) took the law down an entirely different path.

The Americans with Disabilities Act of 1990 provides the Court with a valuable starting point for understanding how to interpret "reasonable accommodation" and "undue hardship" without *Hardison*'s Establishment Clause overlay. Because the ADA's reasonable accommodations provisions were derived directly from the 1972 amendments to Title VII, there is a close textual and historical link between the two. This justifies drawing on the robust case law developed under the ADA as a starting point for the Title VII jurisprudence that might have been, had *Hardison* not led the lower courts astray. The ADA uses the same statutory terms—"reasonable accommodation" and "undue hardship"—as Title VII. Indeed, no other provision of the United States Code applies the same test, or even uses the same terms together.

The fact-sensitive and flexible interest-balancing test that has been developed through decades of ADA case law is well suited to the diverse sorts of religious accommodation questions that can arise in the workplace. And since the interest protected by the ADA—disability—is not religious, interpretations of the ADA by Congress, the Executive Branch, and the courts are free from the Establishment Clause issues that haunted *Hardison*.

To be sure, the ADA cannot provide a complete solution to the jurisprudence of Title VII workplace religious accommodation. Courts will have to develop

a jurisprudence that is tailored to the aspects of accommodation that are unique to religious observance and practice. And the texts of the two statutes are themselves similar but not identical. Even so, pointing lower courts to the ADA will give them an important starting point as they develop the Title VII case law that *Hardison* stunted in 1977.

ARGUMENT

I. *Hardison* was haunted by *Lemon*.

As Justices Marshall and Brennan observed at the time, the Court's decision in *Hardison* dealt "a fatal blow" to Title VII's protections for religious employees by "effectively nullifying" the statute. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 86, 89 (1977) (Marshall, J., dissenting). That nullification was not random or accidental; rather, it had the "singular advantage" of avoiding an alleged Establishment Clause concern. *Id.* at 89. Indeed, without this Establishment Clause overlay, it is virtually impossible to imagine the Court—or any other branch of government—interpreting Congress's term "undue hardship" to mean anything "more than *de minimis* cost." *Id.* at 92 n.6 (doubting that "simple English usage" permitted this interpretation).

The Court had granted certiorari in *Hardison*—just a few years after *Lemon* was decided—to consider, *inter alia*, whether Title VII's requirement of religious accommodations violated the Establishment Clause. *Hardison*, 432 U.S. at 70. And *Lemon* dominated the proceedings. *Lemon* was the lead argument in the employer's brief. Pet. Br. at 21-46, *Hardison*, *supra* (No. 75-1126). The first sentence of oral argument—

and much of the questioning thereafter—similarly focused on alleged Establishment Clause problems. Transcript of Oral Argument at 4, 21-24, 28-29, 41-43, 45-53, 58-61, *Hardison, supra* (No. 75-1126). Perhaps unsurprisingly, the majority framed its conclusion in terms of constitutional avoidance. *Hardison*, 432 U.S. at 85 ("In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath.").

Scholars have long recognized that *Hardison*'s narrow interpretation of "undue hardship" reflected these Establishment Clause concerns. See, *e.g.,* Lucy V. Katz, *Caesar, God and Mammon: Business and the Religion Clauses*, 22 Gonz. L. Rev. 327, 336-337 (1987) (*Hardison* "bespeaks an acute awareness of the establishment clause problems"; "[t]he emasculation of § 2000e(j) in *Hardison* appears to be an effort to avoid the first amendment issue by relying instead on statutory interpretation."); Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 Duke L.J. 1, 7 (1996) ("Apparently to avoid constitutional questions under the Establishment Clause, the Supreme Court interpreted the duty of reasonable accommodation narrowly[.]"). In *Hardison*, the *Lemon* "ghoul" was stalking the Court itself. *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

But *Lemon* has since been "abandoned," and it represents a now entirely outmoded method of Establishment Clause analysis. *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022). The Court's task,

then, is to determine how the term "undue hardship" should be interpreted unencumbered by these now-superseded Establishment Clause concerns.

II. With *Lemon* put to rest, Title VII's reasonable accommodation/undue hardship balancing test should resemble its ADA cognate.

The task of setting out the proper Title VII religious accommodation/undue hardship standard is made significantly easier by the existence of a sister statute—the ADA.

A. Title VII's and the ADA's parallel text, history, and purposes make them sister statutes.

As with other "sister statutes[]" sharing "common language, origin, and purposes," Title VII and the ADA should be "construed * * * alike." *CBOCS W., Inc.* v. *Humphries*, 553 U.S. 442, 448 (2008). Under this "related-statutes canon," "laws dealing with the same subject—being *in pari materia*"—"should if possible be interpreted harmoniously." Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 252 (2012).

This is not to be confused with "subsequent legislative history." See *Sullivan* v. *Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) (contrasting the two concepts). Rather, this interpretive canon "rests on two sound principles: (1) that the body of the law should make sense, and (2) that it is the responsibility of the courts, within the permissible meanings of the text, to make it so." *Ibid.* Given the similarities between Title VII and the ADA, "reasonable accommodation" and "undue hardship" should be interpreted similarly in both.

1. *Text*. The terms "reasonable accommodation" and "undue hardship" (or slight grammatical variants) each appear dozens of times in the United States Code. But the two terms appear *together* only twice: in Title VII and in the ADA.[2]

In both statutes, an employer's obligation not to "discriminate" requires it to "reasonably accommodate" (or make "reasonable accommodations" for) an employee's protected characteristic unless doing so would impose an "undue hardship" on the employer's business. 42 U.S.C. 2000e(j), 2000e-2(a)(1); 42 U.S.C. 12112(a), (b)(5)(A). Both statutes thus require the employer to make special provision for certain employees to ensure that they are not excluded from work because of something that they either cannot or should not be forced to change. At the same time, both statutes place practical limits on the employer's duty to

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[2] The Pregnant Workers Fairness Act, which is expressly derived from the ADA, will go into effect on June 27, 2023, and has not yet been codified. See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. II, 136 Stat. 4459 (Dec. 29, 2022). The new Act expressly adopts the ADA's reasonable accommodation/undue hardship standard *in toto*:

> the terms "reasonable accommodation" and "undue hardship" have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms are construed under such Act and as set forth in the regulations required by this division, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.

Id. at *6085. 42 U.S.C. 1981a(a)(3) also provides for a limitation on damages in ADA claims that cross-references the ADA's reasonable accommodation/undue hardship standard.

accommodate based on "undue hardship." This "similarity of language * * * is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross* v. *Board of Educ.*, 412 U.S. 427, 428 (1973).

This Court regularly applies the in *pari materia* canon to interpret statutes with similar text. For example, the Court gave the same reading to the phrase "scheme * * * to defraud" in the mail, wire, and bank fraud statutes. *Carpenter* v. *United States*, 484 U.S. 19, 25 & n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); *Shaw* v. *United States*, 580 U.S. 63 (2016) (following *Carpenter*'s interpretation of "the analogous mail fraud statute" in bank fraud case). So too with the phrase "persons acting under color of law" in the Religious Freedom Restoration Act. See *Tanzin* v. *Tanvir*, 141 S. Ct. 486, 490-491 (2020). "Because RFRA uses the same terminology as Section 1983 in the very same field of civil rights law, 'it is reasonable to believe that the terminology bears a consistent meaning.'" *Ibid.* (quoting Scalia & Garner at 323). "Reasonable accommodation" and "undue hardship" in Title VII and the ADA should likewise have consistent meanings.

Of course, Title VII and the ADA are not identical in every respect. For instance, after defining undue hardship as "an action requiring significant difficulty or expense," 42 U.S.C. 12111(10)(A), the ADA lists several factors that courts should consider when assessing the employer's burden, 42 U.S.C. 12111(10)(B). But this elaboration on the term "undue hardship" does not distinguish the two acts; instead, it

provides another tool to help better understand Title VII's language. Where Congress passes "several acts" "dealing * * * with the same subject matter"—here, accommodations to prevent employment discrimination—"the later acts should also be regarded as legislative interpretations of the prior ones." *Cope* v. *Cope*, 137 U.S. 682, 688 (1891); accord *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940). Had *Hardison* hewed to the text of Title VII, courts likely would have looked to the "subsequent enactment" of these additional details in the ADA to aid them in applying Title VII's analogous standard. See Scalia & Garner at 254-255. With *Hardison* gone, the ADA can provide a useful guide.

2. *History*. Title VII and the ADA do not share text by accident. Congress modeled the 1972 Title VII amendments on earlier EEOC guidance, and ultimately modeled the ADA on Title VII and subsequent EEOC guidance. This shared history provides even more reason to interpret them similarly.

As Professors Karlan and Rutherglen have explained, "[t]he phrase 'reasonable accommodation' first appeared in regulations published by the Equal Employment Opportunity Commission (EEOC) that sought to define an employer's obligation not to discriminate on the basis of religion." Karlan & Rutherglen, *Disabilities*, 46 Duke L.J. at 6. The EEOC first issued that guidance in 1966. See 31 Fed. Reg. 8370 (June 15, 1966), codified at 29 C.F.R. 1605.1; see also 29 C.F.R. 1605.1(b)(2) ("An employer, to the extent he can do so without serious inconvenience to the conduct of his business, should make a reasonable accommodation to the needs of his employees and applicants for employment in connection with special religious holiday observances.").

The term "undue hardship" first appeared when the EEOC revised 29 C.F.R 1605.1 in 1967. See 32 Fed. Reg. 7092 (May 10, 1967) (requiring an employer "to make reasonable accommodation to the religious needs of employees and prospective employees where such an accommodation can be made without undue hardship on the conduct of the employer's business"). This change from "serious inconvenience" to "undue hardship" raised the bar for employers trying to show that their business interests trumped the duty to accommodate an employee's religious practices. See James Cleith Phillips, *Ordinary Meaning as Last Resort: The Meaning of "Undue Hardship" in Title VII*, at 43-46, 56-57 (Feb. 18, 2023), ssrn.com/abstract_id=4363032.

These EEOC regulations were "essentially codified" a few years later by the 1972 amendments to Title VII. Karlan & Rutherglen, *Disabilities*, 46 Duke L.J. at 6. Congress amended the existing Title VII language to mirror the EEOC language but with a new subsection, requiring employers to accommodate employee's religious beliefs "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

But the 1972 amendments were hobbled before they could even properly begin. Title VII's "broad definition of religion received a surprisingly narrow interpretation in [*Hardison*]" because of the Court's (misguided) Establishment Clause concerns. Karlan & Rutherglen, *Disabilities*, 46 Duke L.J. at 6.

Enter the ADA. Its "fundamental prohibition"—discrimination based on disability—follows the "corresponding prohibitions in Title VII," and its interpretation "flow[s] directly" from Title VII's original context. Karlan & Rutherglen, *Disabilities*, 46 Duke L.J. at 5-6. And, unlike Title VII, the ADA protects an attribute (disability) that raises no Establishment Clause concerns.

In 1973, Congress passed the Rehabilitation Act. Pub. L. 93-112, 87 Stat. 355 (1973). Section 504 of the Act, which contains an anti-discrimination provision that applies to the federal government and certain participants in federal programs, was largely patterned on existing language from the Civil Rights Act, and then interpreted by agency regulations to include the "reasonable accommodation" and "undue hardship" standards already contained in Title VII. 42 Fed. Reg. 22,677, 22,680 (May 4, 1977). The language of the ADA was then explicitly modeled after Section 504 and its ensuing regulations. See Chai R. Feldblum, *The (R)evolution of Physical Disability Anti-discrimination Law: 1976–1996*, 20 Mental and Physical Disability L. Rep. No. 5, 617-620 (Sept.-Oct. 1996); see also Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, *in* Implementing the Americans with Disabilities Act: Rights and Responsibilities of All Americans 37 (Lawrence O. Gostin & Henry A. Beyer eds., 1993) (tracing the development of the ADA from Section 504).

3. *Purpose*. The reasonable accommodation/undue hardship balancing tests in the ADA and Title VII are further related because they "share a common *raison d'être*." *Northcross*, 412 U.S. at 428.

As philosophers Jocelyn Maclure and Charles Taylor have noted, disability and religion are typically linked in discussions about accommodations. The norm of "accommodat[ing] minority religious beliefs and practices" "is a specific modality of a broader legal obligation whose aim is to better ensure the exercise of the right to equality." Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience* 66 (2011). The result of rules "designed for the majority of workers" "may be that a pregnant woman, a person living with a physical disability, or someone whose faith entails specific obligations (in terms of worship, dress, or diet) cannot continue to exercise his or her profession if the work schedule or working conditions are not adapted to their particular characteristics." *Id.* at 66-67. "Hence fairness sometimes requires that measures of accommodation (exemptions, adjustments) be granted, even when the norm envisioned is not discriminatory on the face of it." *Id.* at 67.

Professor McConnell has similarly explained that the theories and purposes of religious and disability accommodations are analogous. Both religious individuals and disabled individuals "*are* different in a way that cannot be changed but can only be accommodated." Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1140 (1990).

For example, "[f]ailure to install a low-cost ramp for access to a building * * * is a core violation of the norms of handicap discrimination theory—even though a rampless building was presumably not constructed for the purpose of exclusion." McConnell, *Free Exercise Revisionism*, 57 U. Chi. L. Rev. at 1140. And

a "person who cannot work on Saturday is * * * excluded precisely on account of his 'difference,' as surely as the wheelchair-bound person is from a rampless building." *Ibid*.

Similarly, "Sabbath observers are not 'favored' over co-workers, any more than injured workers are 'favored' when given disability leave. The law simply alleviates for them a conflict of loyalties not faced by their secular co-workers." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 124-125 (1992); see also *Small* v. *Memphis Light, Gas & Water*, 952 F.3d 821, 828 (6th Cir. 2020) (Thapar, J., concurring) ("[T]he Americans with Disabilities Act * * * requires employers to provide accommodations to their disabled employees. No right-minded person would call such accommodations a form of impermissible discrimination against *non*-disabled employees.").

Given these parallels between the purposes of religious and disability accommodations, "[i]t is significant that in devising standards for discrimination, Congress used an identical formulation" with respect to both religious accommodations and disability. McConnell, *Free Exercise Revisionism*, 57 U. Chi. L. Rev. at 1140 n.133.

In short, given their unity of text, history, and purpose, the Title VII religious accommodation and ADA disability accommodation provisions are sister statutes and should be treated that way by courts.

B. Courts may look to already-prevailing interpretations of "reasonable accommodation" and "undue hardship" from all three branches of government.

Looking to the ADA standard will also allow this Court—and, importantly, lower courts—to build on detailed "reasonable accommodation" and "undue hardship" analyses that have already been provided by Congress, the Executive Branch, and the courts—but without the Establishment Clause concerns that warped the analysis in *Hardison*. This experience also shows that courts have ample experience requiring employers to show "significant difficulty or expense" in order to make out an undue hardship defense.

1. *Congress*. When Congress borrowed the reasonable accommodation/undue hardship framework from Title VII, it provided a detailed articulation of what it meant by "reasonable accommodation" and "undue hardship."

Under the ADA, "no covered entity shall discriminate against a qualified individual on the basis of disability." 42 U.S.C. 12112(a). "Congress provided not just a general prohibition on discrimination 'because of [an individual's] disability,' but also seven paragraphs of detailed description of the practices that would constitute the prohibited discrimination." *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 357 (2013) (citing 42 U.S.C. 12112).

One of those provisions, 42 U.S.C. 12112(b)(5)(A), states that discrimination includes an employer "not making reasonable accommodations to the known physical or mental limitations of an otherwise quali-

fied * * * employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business.'" *Ibid.*

Congress, however, did not stop there. Rather, the ADA expressly defines "[t]he term 'undue hardship' [to] mean[] an action requiring significant difficulty or expense." 42 U.S.C. 12111(10)(A). Moreover, Congress went even further and listed a number of illustrative "factors to be considered" when defining an undue hardship, including:

> (i) the nature and cost of the accommodation * * * ;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. 12111(10)(B).

2. *The Executive Branch.* Executive agency regulations and guidance offer additional information as to the meaning of "reasonable accommodation" and "undue hardship." The EEOC is the federal agency charged with administering the ADA, see 42 U.S.C. 12116, and has issued both regulations and guidance regarding the ADA.

The EEOC regulations interpreting "undue hardship" under the ADA are consonant with the statute. See 29 C.F.R. 1630.2(p)(1). Like the text of the ADA itself, the EEOC regulations provide additional "[f]actors to be considered," including, *inter alia*, the nature and net cost of the accommodation in light of available tax credits and deductions; an employer's overall financial resources, its number of employees, and the number, type, and location of its facilities; and the composition, structure, and functions of the workforce of an employer. 29 C.F.R. 1630.2(p)(2).

The EEOC's ADA guidance documents are also consistent with Congress's description of reasonable accommodations and undue hardships. For example, the EEOC has confirmed that an "undue hardship" means a "significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation." EEOC, Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general ("EEOC Undue Hardship Guidance").

Such hardships include more than just "financial difficulty"; accommodations "that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business" can also create an undue hardship. EEOC Undue Hardship Guidance. The EEOC has also explained how employers "must assess on a case-by-case basis whether a particular reasonable accommodation would cause undue hardship." *Id.* By the same token, the EEOC guidance explains that a cost-benefit analysis is not permissible in determining undue hardship because it wrongly weighs the benefit to the employee instead of weighing only the difficulty or expense to the employer: "A cost-benefit analysis assesses the cost of a reasonable accommodation in relation to the perceived benefit to the employer and the employee. Neither the statute nor the legislative history supports a cost-benefit analysis to determine whether a specific accommodation causes an undue hardship." *Id.*

Thus, the EEOC's ADA regulations and guidance documents are helpful guideposts in interpreting the meaning of reasonable accommodation and undue hardship under Title VII, unencumbered by the Establishment Clause concerns of *Hardison*.

2. *The courts*. The courts have also spent the last thirty-three years interpreting the ADA's reasonable accommodation/undue hardship standards. That robust body of case law can provide a helpful guidepost for interpreting Title VII's undue hardship standard for religious accommodations.

Courts have fleshed out the ADA's reasonable accommodation/undue hardship standard in multiple contexts, including in cases involving "modifications to

the 'structural norms' of the workplace," *i.e.*, "the hours, shifts, schedules, attendance requirements, and leave of absence policies." See Nicole Buonocore Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 Mo. L. Rev. 121, 149 (2019); see also 42 U.S.C. 12111(9)(B) (a "'reasonable accommodation' may include * * * job restructuring [or] part-time or modified work schedules"). Importantly, those decisions have found for both plaintiffs and defendants across a wide spectrum of cases. See Porter, *A New Look*, 84 Mo. L. Rev. at 151-156 (collecting cases and detailing outcomes).

To be sure, this body of case law will not map perfectly onto every religious accommodation request. Courts will therefore need to consider the religion-specific aspects of an employee's claim that may differ from prior disability claims. But the decades-long ADA experience of the lower courts confirms that requiring an employer to demonstrate significant difficulty or expense to make out an undue hardship defense is a workable system for balancing the rights of employees and employers.

* * *

Replacing *Hardison* would be harder if the federal judiciary had to start from scratch. But the existence of a well-developed body of ADA precedent from all three branches of government means the Court can immediately provide significant guidance to employers, employees, and the lower courts while bringing Title VII jurisprudence back into line with its original meaning.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

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